No. 79-76

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1979

HOLLIS O. BLACK, FOR HIMSELF, AND ON BEHALF OF A CLASS OF PERSONS SIMILARLY SITUATED, PETITIONERS

v.

WILLIAM E. PAYNE, EXECUTIVE OFFICER, PUBLIC EMPLOYEES' RETIREMENT SYSTEM, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

Citations

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Hollis O. Black, for himself, and on behalf of a class of persons similarly situated, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit of April 16, 1979 affirming the judgment dated July 9, 1975 of the United States District Court for the Eastern District of California. The or-

der of the district court dismissed petitioners' suit alleging conspiracy by respondents to use the facilities of interstate commerce and the United States mails to violate the antifraud provisions of the federal securities laws in connection with the purchase from and sale to petitioners of securities as defined in said acts, and violations by respondents of petitioners' due process rights under the Fourteenth Amendment to the United States Constitution.

Opinions Below

The opinions of the Court of Appeals and the District Court have not been officially reported, to petitioners' knowledge, but copies accompany this petition as Appendices 1, 2 and 3, respectively (A. 1-32)*

*Refers to pages of the Appendix.

The judgment of the Coart of Appeals was entered on February 15, 1979 (A. 1), and the panel's order denying the petition for rehearing and rejecting petitioners' suggestion for rehearing by the court en banc was entered on April 16, 1979 (A. 22). The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

Questions Presented

1. Whether the District Court erred in holding that membership in PERS is not an "investment contract" and therefore a "security" within §3(a)(10) of the Securities Exchange Act of 1934 (15 U.S.C. § 78(c)(10)) and §2(1) of the Securities Act of 1933 (15 U.S.C. §77(b)(1)), and whether the Court of Appeals erred in affirming this holding of the District Court. (A. 28-31; 5-10).

2. Whether the Court of Appeals er-

red in holding that the District Court's decision, although denominated a dismissal for lack of subject matter jurisdiction was a judgment for failure to state a claim under Fed.R.Civ.P. 12(b)(6). (A. 16).

3. Whether the Court of Appeals erred in holding that the District Court rendered summary judgment against petitioners. (A. 18).

4. Whether the Court of Appeals erred in holding that petitioners have no cause of action for violation of their due process rights. (A. 20).

5. Whether the Court of Appeals erred in denying petitioners' motion for leave to amend the complaint by adding a cause of action alleging conspiracy by defendants to violate the mail fraud statute based upon the same misconduct of

defendants alleged in the complaint from inception of the case. (A. 13-16).

6. Whether the Court of Appeals erred in affirming the decision of the District Court. (A. 16).

Statutes Involved

Applicable provisions of the Securities Exchange Act of 1934, the Securities Act of 1933, the Fourteenth Amendment to the United States Constitution, and the federal Conspiracy and Mail Fraud Statutes are set forth in Exhibit A attached hereto, infra, pp.

Statement

Petitioners' amended complaint, filed originally in the District Court at Los Angeles, California, alleges that sometime between April 1970 and July 1, 1971, the defendants conspired to use the means and instrumentalities of interstate

commerce, and of the mails, to employ a device, scheme and artifice to defraud plaintiffs in connection with the purchase from and sale to them of securities within §3(a)(10) of the Securities Exchange Act of 1934 (15 U.S.C. §78j(a)(10)) and §2(1) of the Securities Act of 1933 (15 U.S.C §77b(1)), namely, investment contracts in the form of plaintiffs' memberships in PERS' contributory retirement plan, and to obtain money and property from plaintiffs by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which made, not misleading, and to engage in transactions, practices and courses of business which operate and would operate as a fraud and deceit upon plaintiffs in

connection with said purchase from and sale to them of said securities. R.339, 357).

Defendant Public Employees' Retirement System (PERS), a proprietary state agency created by the California legislature, engages in a proprietary capacity as a business enterprise in developing, providing for and administering retirement plans on an employee-employer contributory reserve basis for state employees, as well as for public employees of California Counties and Cities pursuant to contracts with their public employers. PERS owns investment securities having a value exceeding 40% of its total assets (exclusive of government securities and cash items) on an unconsolidated basis, and is an "investment company" within §3(a)(19) of the Securities Ex-

change Act of 1934 and §3(a)(3) of the Investment Company Act of 1940. At all times mentioned herein the Board of Administration of PERS was and is the public agency established pursuant to Section 20100, et seq., California Government Code,[1/] for determination and administration of benefits upon and after retirement of members. §20103 vests management and control of PERS in the Board. §20120 empowers it to make rules. The Board is an "Affiliated person" with respect to PERS within §3(a)(19) of the Securities Exchange Act of 1934 and §2(a)(3) of the Investment Company Act of 1940. Defendant Payne is the Executive Officer of PERS and authorized by Board rules to

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1/Section references, unless otherwise indicated, refer to sections of the California Government Code as in effect prior to July 1, 1971.

conduct the administration of PERS, including acting upon retirement applications and the fixing and authorization of retirement benefits, either personally or through delegated subordinates. (R.335).

Plaintiff Hollis O. Black brings this action for himself, and on behalf of a class of persons similarly situated, that is, persons who were members of PERS prior to enactment of SB 249, hereinafter mentioned, and who at the time of its enactment and effectiveness had attained age 65 but not age 70. (R. 336).

At the time plaintiffs became members, the mandatory retirement age provided by the retirement law was age 70. It had been age 70 continuously since the retirement law was enacted in 1931, and during all of that time was and had been part of the retirement plan and contract.

For many years prior to enactment of SB 249 the 1.370 age 65 or over retirement age fraction provided by the retirement law for augmentation of benefits provided by the general basic benefit formula had been assigned to members who did not retire until they reached age 65 or over. During all of said time said provision was part of the retirement plan and contract, and plaintiffs relied upon this and said age 70 compulsory retirement age as bases of accepting and continuing employment with their respective public employers. (R. 336).

SB 249, enacted by the California legislature effective July 1, 1971, lowered the compulsory retirement age, in steps, from 70-67. It increased the basic benefit formula from 1/60th to 1/50th of final compensation at age 60, but abol-

ished all retirement age fractions for augmentation of the basic benefit for all ages above 63, the effect of which being to substitute for plaintiffs' already earned 1.370 age 65 or over fraction the lower age 63 fraction. It provided for a 7% contribution rate for all members to replace the previous varying rate based upon age and sex of a person at the time of becoming a member, averaging about 7½%. (R. 336,337).

As is well known to defendants, rank and file members of PERS are not attorneys and are unsophistocated relative to SB 249. Most are not financially able to hire a lawyer to advise and represent them in a complex and technical lawsuit against state government agencies and local governmental agencies involving the constitutionality of statutes, etc. They are

not informed and advised of steps, procedures and filings they must make and of those they should refrain from making as of a particular time or times in order properly and timely to assert and protect, and not to waive, their respective rights and interests. (R. 338).

Members normally rely upon PERS' superior knowledge and authoritative position. A person becomes a member of PERS upon entry into state employment, or upon the effective date of the contract for PERS coverage between his public employer and PERS. In either case, each member is informed generally by his employer regarding the retirement plan and PERS. The employer also provides him with an information booklet prepared by and distributed to members by PERS through their public employers. The member is told by his em-

ployer, in substance, that if he should ever have any question in regard to the retirement plan or as to his retirement rights and benefits which his employer cannot answer, that correct and authoritative information can be obtained from PERS. Members usually follow, and have followed this procedure since first becoming members. During that period they develop and have developed confidence in the superior knowledge of PERS on the subject and respect for PERS' authoritative position relative to administration of the retirement law. As a result, they usually follow and normally rely upon the information PERS furnishes, whether through their employers, whether directly from PERS, or from the information booklets which PERS publishes and distributes from time to time. (R. 338).

Parts of said device, scheme and artifice to defraud, the complaint alleges, were that the defendants

(I) would make a final, ex parte determination to apply SB 249 to plaintiffs without giving them any prior notice or opportunity for hearing, and that after said ex parte determination had been made would then give plaintiffs notice, but no opportunity for hearing, that each of them would be mandatorily retired before reaching age 70 pursuant to SB 249. (R. 339).

(II) would conceal from plaintiffs information in regard to their civil causes of action against defendants for salary and benefit losses due to their forced pre-age 70 retirement and abolishment of their already earned 1.370 benefit augmentation fraction.

(R. 339,340).

(III) would grossly exaggerate the effect the increase of the general basic benefit formula from 1/60th to 1/50th of final compensation at age 60, and at the same time ignore completely or grossly minimize the benefits and salary losses plaintiffs will sustain if the above mentioned provisions of SB 249 should be held unconstitutional (R. 340) for example

PERS would state to the plaintiff forced by SB 249 to retire with final compensation of $1,000.00 a month at age 69 with 34 years of service instead of at age 70 with 35 years of service to his credit, that on the basis of his final compensation he would receive monthly benefits of $816.00 for the rest of his life, or $40.00 a month more than he

would have received before SB 249, but would omit to state

(a) that this $816.00 was only $17.00 more than the $799.00 monthly benefit he would have received at age 70 under the 1/60th formula; and

(b) that if §38 of SB 249 should be held unconstitutional, his total compensation of $12,000.00 (minus a 7% retirement contribution of $840.00) covering the one year until he reached age 70 would be $1,368.00 more than the $9,792.00 total benefits he would receive under SB 249 during the same year period; and that on reaching age 70 he would commence receiving monthly benefits of $840.00 for the rest of his life instead of $816.00; and also

(c) if the courts should also hold unconstitutional that part of SB 249

which abolishes the 1.370 age 65 or over benefit augmentation fraction, his monthly benefit would be increased to $959.00 for the rest of his life. (R. 340, 341).

(IV) would do the following in order to make it appear to plaintiffs that they had no alternative but to retire before reaching age 70 pursuant to SB 249, accept and write-off any salary and benefit losses involved, and be satisfied with the benefits they would receive under SB 249:

About two months before the mandatory retirement age of each plaintiff was reached according to SB 249, PERS would mail him a mandatory retirement notification stating he would be retired on the first day of the month following the month in which he reached that age, but

would omit to state

(a) that the California courts have made no final determination of the constitutionality of the above mentioned provisions of SB 249, and that no advance forecase could be made as to what final decision would be reached on either question;

(b) that prior to SB 249 no change in the age 70 mandatory age had been made since the retirement law was enacted some 40 years ago, in 1931;

(c) that as of a particular time or times, from one to three suits, including two class actions, were pending in the California courts challenging the constitutionality of said provisions; etc. (R. 343, 344).

(V) for the purpose of inducing plaintiffs to agree to retire and thereby to release or waive their respective causes of action with respect to said provisions of SB 249, PERS, in and as part of the mandatory retirement notification sent to each plaintiff, would indicate and imply that it was necessary that he complete the Application for Retirement that was enclosed and send it to PERS soon as possible in order for PERS to start calculation of his retirement allowance, when in fact, it was not necessary for PERS to receive an Application for Retirement in order to start such calculation; further, that PERS omitted to state that if he should complete and return the form it might be held to constitute a release or waiver, and obstruct and impede or forestall efforts by him to assert a cause of action relative to SB 249 if he should later

decide to do so. (R. 344, 345).

(VI) would, for the purpose of preventing entirely or delaying plaintiffs from attacking the constitutionality of said provisions of SB 249 until after all applicable statutes of limitation had run relative to the filing of required administrative claims and suits in court for salaries and benefits they were prevented from earning and receiving if either of said provisions should be held unconstitutional, PERS, among other things (R. 345, 346)

(a) state to each plaintiff that he would receive more benefits under SB 249 than he would have received before SB 249, but omit to state that this would depend upon whether or not said provisions are held to be constitutional or unconstitutional;

(b) state that any plaintiff who attacked the constitutionality of said provisions would knock himself out of having his benefits computed on the 1/50th formula and would have his computed on the old 1/60th, but omit to state that no attack on the 1/50th formula has been made, and that only a final court decision can knock out the 1/50th formula, etc.

Overt acts by defendants in pursuance of said conspiracy and to effect the objects thereof are catalogued in the complaint (R. 347, 352) including the distribution to members commencing June 21, 1971 of the "July 1971" Information Booklet" bearing the following front cover heading:

RETIREMENT
and
RELATED BENEFITS
For
MISCELLANEOUS EMPLOYEES
1/50th at age 60 formula

(R. 348) but tells about the changes in the mandatory retirement age for the first time on page 5 in an item - not identified by a heading such as "Changes in Mandatory Retirement Age"- but under a bold, capitalized heading reading

RETIREMENT BENEFITS

On information and belief, the complaint alleges that plaintiffs have not filed statutory claims and court suits due to defendants' failure to make full disclosure of all material facts to them (R. 352, 353); also that on July 1, 1971 when SB 249 became effective, there were 415,853 members of PERS, of whom 5,732 were miscellaneous members who qualify for membership in this class action, that is, persons who on and prior to July 1, 1971 were members of PERS who had attained age 65 or over but not age 70; that of these,

1100 were age 69, 2268 were age 68 and 2364 were age 67. While plaintiffs are not informed as to the average amount of salary received by these 5,732 members or as to the average number of years of service each has or will have served at the time he reached or will have reached mandatory retirement age according to SB 249, or age 70. However, $1,000.00 a month assumed final compensation and an assumed 32, 33, 34, and 35 number of years of service would appear to be reasonably close for the purpose of the estimates set forth in the complaint, including these: Salary losses for all 5,732 members, on this basis, amounted to $26,055,360.00; benefit losses $48,689,049.60; 1.370 age 65 or over benefit augmentation fraction losses $159,718,972.80; and total losses for all 5,732 members amounted to $234,463,382.40.

Count 2 of the Complaint alleges violations of plaintiffs' due process rights by defendants. Counts 1 and 3 conclude: (R. 354, 355)

On information and belief: The Application for Retirement forms which practically all plaintiffs have filled out and returned to PERS at PERS' request thus far do not represent the real and intended agreement on the part of said plaintiffs and that few, if any of them, would have filled out, signed and sent PERS an Application for Retirement if PERS had preceded or accompanied that request with a full and fair disclosure of all relevent and material facts. Not being furnished such full and fair disclosure, they were induced to sign and return and thereby to sell PERS their retirement plan memberships by their reliance upon the superior

knowledge and authoritative position and the above mentioned inaccurate, incomplete and misleading statements made by PERS. Plaintiffs allege that the real and intended agreement was and is that said agreement embody each and every right which plaintiffs and each of them had under the law as of the time they received from PERS the mandatory retirement notification, the Application for Retirement form, and PERS' request that they fill out and return it to PERS, including the following:

That if the Courts should finally determine that lowering the mandatory retirement age from 70-67 was unconstitutional,

(a) plaintiff will immediately be restored to his position with his public employer from which he was retired

and paid all salary, including all increases, he was prevented from earning from the time of his retirement until his restoration, with interest, any benefits which he received during the time of said retirement to be repaid by plaintiff in cash or through appropriate deductions from his salary; and

(b) if plaintiff has already attained age 70 prior to said determination of unconstitutionality, he will be paid all salary, including all increases, which he was prevented from earning, with interest, from the date of his retirement pursuant to SB 249 until the first day of the month following the month in which he reached age 70; and, commencing on that day he will receive

retirement benefits computed on the basis of his years of service and salaries he was due to render and earn to age 70, using the retirement age fraction as determined by the Courts; said benefits subject, however, to deduction of the total amount of benefits, if any, received by him from the time he was retired pursuant to SB 249 until he reached age 70.

That it is expressly stipulated and understood that the foregoing provisions will be implemented and carried out immediately and automatically upon the above indicated final determination by the Courts, without the necessity on the part of any plaintiff to file any claim or application relative to any salary or benefit due with the State Board of Control, any appropriate local agency, or

PERS, and that pending such final determination all applicable statutes of limitation relative to the filing of administrative claims or suits in Court are tolled.

That plaintiffs will suffer irreparable injuries and damages unless a mandatory injunction issue to PERS requiring it to reform the application for retirement agreements which plaintiffs filled out and returned to PERS at PERS' request so that said retirement agreements, and each of them, shall conform with the real and intended agreement in accordance with the foregoing; and further providing and requiring that PERS specifically perform said retirement agreements as so reformed, and each of them.

Summary of Argument

Summarized briefly, the District

Court held and the Court of Appeals affirmed that no "investment contract" and therefore no "security" as defined in the federal securities acts was involved, and that plaintiffs had no due process cause of action. From the amount of space devoted to it in its opinion, the Court of Appeals seems to be concerned not only with holding for the reason just stated that these plaintiffs have no protection under the antifraud provisions of the federal securities laws, but also with forestalling any amendment to their complaint to allege a civil cause of action for conspiracy to violate the mail fraud statute by reason of the very same misconduct of the defendants.

No Investment Contract Holding

Both the District Court and the Court of Appeals argue that no "investment con-

tract" is involved because membership participation in PERS does not involve a reasonable expectation of profits derived solely from the entreprenurial or managerial efforts of others within the Howey formula because (1) PERS was not created by the California to make a profit or to provide an investment opportunity, citing §20001; (2) PERS benefits are determined by a statutory formula, not by the income or profit made by PERS; (3) any income earned by PERS must either be credited to contributions or held in reserve against later deficiencies; and (4) plaintiffs did not "choose" to participate because of a reasonable expectation of profits from the efforts of others since membership is compulsory.

However, the courts apparently failed to consider that §20001 states that PERS

was created "to effect economy and efficiency in the public service" and that one of its primary objectives was to provide employment incentives additional to the regular salary or remuneration. As stated in §1019 Williston on Contracts, Third Ed. at 220:

> Any number of plans and programs designed to provide employment incentives additional to the regular salary or remuneration had been devised in the endeavor to retain experienced personnel and make employment more attractive. Some form of retirement pay or pension is standard practice in virtually all types of employment, private as well as governmental. (Emphasis supplied).

See cases cited in Notes 1 and 2.

In creating PERS the legislature created an "investment company" as defined in the Securities Exchange Act of 1934 and the Investment Company Act of 1940, as stated, supra. It created PERS

because it was necessary that the state have a retirement program and plan in order to compete with other employers, private as well as governmental, in obtaining and retaining capable personnel. Instead of creating a noncontributory plan, the legislature considered and continues to consider that it effects "economy and efficiency" in the public service to have a contributory plan. The member is paid "regular interest" on his contributions, which means interest at the annual interest rate fixed by the Board for purposes of crediting of interest, compounded annually (§20026). This is a profit to the member, derived solely from the managerial efforts of others. Whether denominated a "profit" or a "nonprofit" operation insofar as the state is concerned, it effects economy to the extent that it

does not have to pay the full amount of the member's pension, plus any net income it receives from the investment of contributions. In so far as the member is concerned it is immaterial whether his profits are determined by a statutory formula, they come from the managerial efforts of others. The argument that members did not "choose" to participate in PERS to make a profit from the efforts of others because membership is compulsory is not realistic. Although denominated "compulsory", membership is essentially voluntary. We submit that it is likewise immaterial whether the state law considers participation as deferred compensation for service. The Court of Appeals also argues that as a state program PERS lacks the elememt of economic risk usually associated with intestments. However, this Court in Tcherepnin v.

Knight, 389 U.S. 332, 19 L Ed 2d 564, 88 S. Ct. 548, held that

> As was observed in Howey, "it is immaterial whether the enterprise is speculative or nonspeculative. 326 U.S. at 301, 90 L ed at 1251, 163 ALR 1043

Denial of Leave to Amend

The Court of Appeals denied petitioners' motion for leave to amend the complaint by adding a cause of action alleging conspiracy by defendants to violate the mail fraud statute based on the very same facts alleged in the complaint when originally filed. Reasons stated are that although the district court denominated its dismissal a dismissal for lack of subject matter jurisdiction the court feels it is more properly based upon a failure to state a claim and becomes a motion for summary judgment pursuant to

Fed.R.Civ.P 12(b)(6) since material other than the pleadings was filed, because the district court's judgment is a judgment on the merits, and because petitioners did not ask leave to amend until their reply brief was filed in the Court of Appeals.

In the first place, there is no indication in the record that if the district court converted its motion to one for summary judgment it gave the parties notice of the changed status and a reasonable opportunity to present all material made pertinent to such a motion by Rule 56. Costen v. Pauline's Sportswear, Inc., C. A.9th, 1968, 391 F.2d 81; Erlich v. Glames, C.A.9th, 1967, 374 F.2d 681.

Next, the Court will observe (R.396) that the "judgment on the merits" the Court of Appeals referred to is a printed form denominated "Judgment on Decision By

The Court" filled in by a deputy clerk - not the District Court, stating (omitting strike-overs)

> This action came on for (hearing) before the Court, Honorable Thomas J. MacBRIDE, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been rendered July 9, 1975.
>
> It is Ordered and Adjudged Judgment is hereby entered for the Defendants and against the Plaintiff.
>
> Dated at Sacramento, California, this 9th day of July, 1975.

The "decision" referred to was the district court's decision the same day granting defendants' motion to dismiss for lack of subject matter jurisdiction and denying plaintiffs' motion for summary judgment.

The Clerk of this Court is being requested to ask the Clerk of the Court of Appeals to forward to this Court the

Docket Files Nos. 76-2331 and 76-2906, which reflect fully the reasons why petitioners' counsel was unable to request the court for leave to amend the complaint at the time the court denied petitioners' motion for reconsideration and for new trial on October 6, 1975 or a reasonable time thereafter.

Due Process Claim

Petitioners' respectfully request permission to postpone response relative to the due process claim at this time as Miller v. State, 18 Cal.3d 808, cited by the Court of Appeals is involved in the case of Hollis O. Black, Appellant, v. William E. Payne, Executive Officer, Public Employees' Retirement System, et al., Docket No. 77-929 in this Court. Within the next few days appellant Hollis O. Black intends to file a motion that the

Court set aside and vacate the order of Mr. Justice Rhenquist of July 31, 1978 denying appellant's application for an extension of time to file a petition for rehearing and for other appropriate relief. If the motion should be granted petitioners will move that this case be consolidated with that case.

For the foregoing reasons, the judgment of the Court of Appeals affirming the judgment of the District Court holding that no "investment contract" and therefore no "security" as defined in the federal securities acts is involved, and denying petitioners' motion for leave to amend should be reversed.

Respectfully submitted,

Hollis O. Black
Attorney for Petitioners